OOI PENG SENG

v.

FATIMAH SAAD & ORS

HIGH COURT MALAYA, ALOR SETAR
KN SEGARA J
[CIVIL APPEAL NO: 12-17-1998]
26 OCTOBER 1998

ROAD TRAFFIC: *Negligence - Fatal accident - Collision between two vehicles - Finding of equal liability - Whether sustainable - Whether against weight of evidence - Deceased riding motorcycle at night without headlights on - Whether wholly to be blamed*

This was an appeal against the decision of the sessions court holding, in a claim for loss of dependency, that the defendant and the first plaintiff's husband, since deceased, were equally to be blamed for an accident that took place between their respective motorcycles at Jalan Kuala Kedah-Jalan Yan at about midnight 22 August 1994. The facts showed that there were no independent eye witnesses to the accident and that the court, apart from relying on the police reports, photographs, the sketch plan and the evidence of the investigating officer, had only the evidence of the defendant and his pillion rider to peruse through and consider. In the court below, it was the defendant's case that the deceased, at the material time, was riding without any lights on and had suddenly crossed into his correct path of travel, so that he could only see 'a dark object' before colliding into the same. The learned sessions court judge took the view that the defendant ought to have known that the dark object was a motorcycle, and therefore, apportioned liability at 50% for the plaintiff and 50% for the defendant.

Held:

[1] The learned sessions court judge had misdirected herself in coming to her apportionment of liability. She had failed to consider whether the plaintiffs had discharged the burden of proof, on a balance of probabilities, that the defendant was in fact negligent. A careful study of the sketch plan, and the police report lodged by the pillion rider, would have revealed that both had in fact corroborated the defendant's version of the accident.
(p 487 h-i)

[2] The sketch plan indicated overwhelmingly that the collision occurred somewhere in the centre for that half of the road meant for the lawful travel by vehicles proceeding towards Kuala Kedah from Yan. In such circumstances, therefore, there was merit in the evidence of the defendant

that it was whilst he was proceeding in his correct path of travel that the deceased had suddenly crossed from right to left giving him no opportunity to avert the collision. His testimony that he merely saw a dark object suddenly cutting across his path lent credibility to his testimony that the deceased was also not travelling with any lights on. (p 488 h-i)

[3] The duty of a driver is only to exercise reasonable care and he is not under a duty to be perfect in the sense of being able to anticipate other drivers acting in a negligent or irresponsible manner. In the instant case, the deceased had failed to give any signal to deviate from his course of travel suddenly, and was therefore wholly to be blamed for the accident. (p 489 f)

[Appeal allowed.]

Case(s) referred to:
KR Taxi Service Ltd & Anor v. Zaharah & Ors [1969] 1 MLJ 49 ***(foll)***

For the appellant - VK Dasaratharaj Pillay; M/s VP Nathan & Partners
For the respondent - Saw Hoe Teik; M/s NM Tiong & Co

Reported by WA Sharif

JUDGMENT

KN Segara J:
This appeal before me is from the decision of the learned sessions court judge, Alor Setar, in respect of a dependency claim instituted by the 1st plaintiff, the wife of Abdul Rahman bin Abdul Hamid, deceased, and her seven children, arising from the death of her husband in a motor vehicle accident on 22 August 1994, involving a motorcycle ridden by the deceased and a motorcycle ridden by the defendant. The appeal is against both, quantum and liability.

The deceased was aged 44 years and a padi-planter. In cross-examination, SP2, the 1st plaintiff, wife of the deceased, agreed that the deceased contributed for the support of the family about RM700 per month and not RM1,000/ RM1,200 per month (see p. 31 Record of Appeal) “Saya setuju sumbangan dia pada keluarga adalah RM700 dan bukan RM1,000/RM1,200.” In the circumstances, the learned Sessions Court judge clearly erred in assessing the loss of dependency at RM66,000 [RM1,000 x 66 months (5 1/2 years)]. It should have been assessed at RM46,000 [RM700 x 66 months (5 1/2 years)].

It was most unfortunate for the plaintiffs that there were no eye-witnesses who could testify on their behalf as to how the fatal accident occurred. The plaintiffs had to rely almost entirely on the police-reports, photographs, sketch-

plan & key, and the evidence of the investigating officer who arrived at the scene about two hours later. There was no evidence that the defendant had been charged for any offence in relation to this fatal accident.

The deceased was riding motorcycle AAS 6568 alone, and the defendant was riding motorcycle KU 7851, together with a pillion, at about mid-night or 1am on 22 August 1994 along Jalan Kuala Kedah/Jalan Yan when the collision between the two motorcycles occurred. Although the defendant and the pillion were also injured, they were fortunate not to have suffered any fatal injuries.

The plaintiffs had pleaded in their statement of claim that the deceased and the defendant were travelling in opposite directions along Jalan Kuala Kedah/ Jalan Yan when the defendant, without any warning, suddenly encroached on to the lawful path of the deceased [see paras. 3 & 4g of statement of claim, at pp. 11 and 12 Record of Appeal]. In order to have succeeded in this action it behoved upon the plaintiffs to establish, on a balance of probabilities, that the defendant did in fact encroach on to the lawful path of the deceased suddenly, without any warning. The defendant, on the other hand, pleaded in his defence, *inter alia*, that the deceased had suddenly crossed the road from left to right, giving no opportunity to the defendant to avoid the accident [see para. 3n of statement of defence at pp. 17 and 19, Record of Appeal].

In assessing liability at 50:50 the learned sessions court judge said:

> Mahkamah dapati liability dalam kes ini harus dibahagikan 50% – Plaintif, 50% – Defendan kerana secara am Mahkamah dapati dijalan yang lurus dimana keadaan lalulintas lapang, tidak ada sebabnya Defendan tidak nampak Plaintif lebih awal. Mahkamah juga dapati ada kemungkinan besar Defendan tidak memberi perhatian yang secukup-cukupnya atas jalan raya kerana beliau mengakui dia telah nampak bayang dan seharusnya lebih berhati kerana ini mungkin bermakna kewujudan satu lagi kenderaan di jalan raya itu. Secara am, tertakluk atas rajah kasar, serpihan kaca, kerosakan kenderaan Plaintif dan Defendan serta keterangan Defendan sendiri telah menyakinkan Mahkamah bahawa liability harus diperbahagikan sama rata, kerana nampaknya juga motosikal Plaintif telah belok kanan untuk masuk ke rumahnya yang kedudukannya di sebelah kiri jalan raya itu.
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> [see pages 69-70 Record of Appeal]

In arriving at the above apportionment of liability, the learned sessions court judge has clearly misdirected herself on the available silent evidence of the sketch-plan. She has failed to consider whether the plaintiffs have discharged the burden of proof, on a balance of probabilities, that the defendant was in fact negligent, after taking into consideration his oral testimony and then properly evaluating its weight, credibility and consistency with the emerging scenario of how the accident in all probability occurred. A careful study of

the sketch-plan would have revealed that, it in fact corroborated defendant's version of the accident. The learned sessions court judge had further failed to properly consider and evaluate the police report of the pillion rider, which was made about an hour after the accident. If she had done so, she ought to have concluded that it further supported the defendant's version, and that the deceased was wholly to blame for the accident. The said report, so far as is relevant reads:

> Pada 22.8.94 jam lebihkurang 0100 hrs saya membonceng motosikal kawan saya nama Ooi Peng Seng No. KU 7851 dari Pekan Sg. Limau Dalam hendak balik ke rumah di tempat yang sama (Sg. Limau Dalam) **tiba-tiba datang sebuah motosikal** No. tidak ingat **tidak pasang api lampu besar hadapan** datang dari arah bertentangan telah **membelok ke kanan dengan tidak memasang lampu isyarat sebelah kanan betul-betul di hadapan motosikal yang saya bonceng** ...
> (emphasis provided)
> [see page 58 Record of Appeal]

The sketch-plan shows the road, Jalan Kuala Kedah/Jalan Yan, to be a fairly wide main road, measuring 7.20m (B-D). It is a two-way traffic road, divided in the center partly with a broken white line and partly a continuous white line that proceeds towards Yan. Each half of the road is 3.60m (B-C and C-D) [see pp. 60 & 61 of Record of Appeal]. The area where broken pieces of glass was found is marked G, and it is somewhere in the middle of the left half of the road, in the direction of Kuala Kedah, that is, in the direction in which the defendant was proceeding that day. The deceased was travelling in the opposite direction of the plaintiff – therefore, he would be proceeding from the direction of Kuala Kedah to Yan, and lawfully travelling on the right half of the road. A shoe, marked F, is about 1.20m from the left edge of the road. It is quite close to G (the broken pieces of glass). SP1 (the investigating officer) had not ascertained whose shoe it was. Nevertheless, there can be very little doubt that the said shoe must have come off from the foot of one of the three victims involved in the accident, that is, the deceased, the defendant or the pillion rider. F and G on the sketch-plan indicate overwhelmingly that the collision between the two motorcycles must have occurred somewhere in the center of that half of the road meant for the lawful travel by vehicles proceeding towards Kuala Kedah from Yan. In such circumstances, the evidence of the defendant, that it was whilst he was proceeding on his correct path of travel that the deceased suddenly crossed from right to left giving him no opportunity to avert the collision, is consistent with his defence. His testimony that he merely saw a dark object suddenly cut across his path lends credibility and conviction to his testimony that the deceased was also not travelling with any lights on, because the defendant's motorcycle lights would certainly have caused any on-coming motorcycle travelling without lights, in

the darkness of that night, to be perceived by the defendant as a dark object, without a clue as to what that dark object was, at that point of time. The defendant testified:

> ... Saya keluar daripada kedai kopi ambil kawan – menghala ke Jln. Kuala Kedah. Selepas sebuah titi. Tiba-tiba **nampak ada benda hitam**, saya terus langgar.
> (emphasis provided)
> [see page 37 Record of Appeal]

The learned sessions court judge had clearly misdirected herself in concluding that the defendant knew that the dark object, which was coming from the opposite direction, was a motorcycle and had, therefore, to exercise due care and attention. In her grounds of judgment she stated:

> Mahkamah juga dapati ada kemungkinan besar defendan tidak memberi perhatian yang secukup-cukupnya atas jalan raya kerana beliau mengakui dia telah **nampak bayang** dan seharusnya lebih berhati kerana ini mungkin bermakna kewujudan satu lagi kenderaan di jalan raya itu.
> (emphasis provided)
> [see pages 69/70 Record of Appeal]

"nampak bayang" as stated by the learned sessions court judge, and "nampak benda hitam" as testified by the defendant, connote entirely different visions, images and perceptions of what was actually seen and reacted to by the defendant at the scene, in that dark and quiet night of a highway that was devoid of any other traffic at that time.

The deceased had clearly failed to give any conventional signal to deviate from his course of travel suddenly, and was, therefore, wholly to blame for the accident. The deceased crossed the road in the path of the defendant who had the right of way.

In *KR Taxi Service Ltd & Anor v. Zaharah & Ors* [1969] 1 MLJ 49 it was held by the Federal Court that the duty of a driver is only to exercise reasonable care and that he is not under a duty to be perfect in the sense of being able to anticipate other drivers acting in a negligent or irresponsible manner. Ong Hock Thye FJ said at p. 53:

> With respect, it seems to me that unless we hold that the development of the common law of negligence has now reached the stage of imposing strict liability on a person not to injure his neighbour, however blamelessly, we cannot demand that all drivers of vehicles should be perfectionists. And further down the same page:
>
> The degree of care that need be kept while driving along an open country road is not quite the same as that which ought to be observed in a crowded city street. Merely because drivers of motor cars and motor-cycles do occasionally

> behaved recklessly does not mean one must constantly anticipate that every other vehicle observed traveling normally is liable, without warning, to be driven, as if by a person suddenly gone mad. I do not think such extraordinary care and alertness is required of the motorist at all times he is on the road. Otherwise all vehicular traffic must grind to a standstill. **What form of folly is to be regarded as foreseeable must depend on the surrounding circumstances of each case. I do not think any rule of general application should be laid down**. (emphasis provided)

The learned sessions court judge should have asked whether it was inherently probable, in the light of where the broken pieces of glass and shoe were found (G & F on the sketch-plan), for the defendant to have crossed into the lawful path of the deceased, who was coming from the opposite direction. The learned sessions court judge should have also further asked herself whether it was inherently probable that the deceased had in fact travelled without his motorcycle lights switched on or functioning, and had, thereby, encroached on to the lawful path of the defendant, because the deceased would have been at a disadvantage to know his true position on the road as the scene of the accident was not illuminated by street lights or passing motor vehicles.

The learned sessions court judge's decision is against the weight of the evidence and the proper inferences to be drawn thereon. The deceased is wholly to be blamed for this accident.

Appeal allowed with costs.